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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.S., et al. Persons Coming Under the  
Juvenile Court Law.

B213369  
(Los Angeles County  
Super. Ct. No. CK63088)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

Appeal from an order of the Superior Court of Los Angeles County. Jan G.  
Levine, Judge. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant  
and Appellant.

James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Deputy  
County Counsel, for Plaintiff and Respondent.

\* \* \* \* \*

Mother appeals from the order terminating her parental rights to her daughter, D.M.<sup>1</sup> She contends there was substantial evidence that the Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i) exception to the preference for adoption applied.<sup>2</sup> We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

D.M.'s older half-brother, A.S., was born November 17, 2003. A.S. was detained in April 2006, after it was discovered that mother's boyfriend hit A.S. during a weekend visit with mother. Mother eventually submitted on, and the juvenile court sustained, an amended section 300 petition which alleged mother failed to protect A.S. from physical abuse by her male companion and had endangered A.S. by leaving him in the care of her maternal step-grandfather (hereafter step-grandfather), who had physically abused and sexually molested mother when she was a child.

A.S. was still living in foster care, but mother's visits had been liberalized to unmonitored by the time D.M. was born in January 2007. In July 2007, mother was reunited with A.S. under the supervision of the Department of Children and Family Services (department). At that time, mother was living with maternal great-grandmother (hereafter great-grandmother), across the street from where maternal grandmother (hereafter grandmother) and step-grandfather lived (collectively the grandparents). The social worker told mother that A.S. could not be left alone with step-grandfather. But at an unannounced visit, the social worker learned that mother was allowing A.S. to sleepover at the grandparents' home, as a result of which A.S. was being left alone with step-grandfather when the other family members went to work for the day. The social worker tried to help mother find free childcare so that mother would not have to leave

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<sup>1</sup> Mother's parental rights were terminated as to two of her children: D.M. and her half-brother, A.S. Mother appeals only from that portion of the order terminating her parental rights to D.M.

<sup>2</sup> All future undesignated statutory references are to the Welfare and Institutions Code.

A.S. with the grandparents, but mother was resistant and instead continued to leave A.S. with them.

During an unannounced visit on October 4, 2007, great-grandmother told the social worker that she argued with mother the night before over mother's boyfriend sleeping over (great-grandmother was afraid they would be evicted because three adults were living in the apartment, instead of two adults as specified in the lease). During the argument, mother "lunged and swung at [great-grandmother] while holding [D.M.] in her arms. Mother's boyfriend . . . pulled mother off [great-grandmother] and in the process, mother and [D.M.] fell to the ground. [Great-grandmother] reported that she then pulled [D.M.] out of mother's arms because she was crying and [the boyfriend] dragged mother out of the apartment . . . ." Neighbors called the police but no report was filed as mother was already gone when the police arrived. Great-grandmother gave notice to the landlord because she was afraid to continue living with mother. Mother later confirmed to the social worker great-grandmother's account of the incident.<sup>3</sup> While the social worker was helping mother to find alternative housing, mother mentioned to the social worker that she had sold some marijuana in order to make a little extra money.

A.S. and D.M. were both detained the next day. The department filed a section 300 petition as to D.M.<sup>4</sup> In November 2007, mother submitted an amended

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<sup>3</sup> When great-grandmother spoke to a dependency investigator about the incident several weeks later, she gave a slightly different account from the one she had given to the social worker immediately after the incident. Great-grandmother said that when she intervened in an argument between mother and her boyfriend, mother told her to "shut up"; great-grandmother hit mother on the shoulder and told her to be more respectful; mother tried to hit back, but mother's boyfriend restrained mother and pulled her outside. Mother's banging on the locked door caused the neighbors to call the police. When the police arrived, great-grandmother told them that mother did not hit her. Great-grandmother denied being afraid of mother and said the social worker had tried to get her to sign a letter saying she was moving out.

<sup>4</sup> As to A.S., a section 342 subsequent petition was filed alleging mother placed A.S. at risk by leaving him with step-grandfather, selling illicit drugs, and engaging in a domestic dispute with great-grandmother.

section 300 petition which alleged that D.M.'s physical and emotional health and safety were at risk as a result of the domestic violence between mother and great-grandmother (§ 300, subd. (a)); D.M. was at risk of physical and emotional harm as a result of mother leaving A.S. with step-grandfather, mother selling marijuana while D.M. was in mother's care, and mother engaging in a violent altercation with great-grandmother (§ 300, subd. (b)); and a sibling (A.S.) had been abused or neglected (§ 300, subd. (j)). Mother was given monitored visits with both children and ordered to drug test and participate in parenting education, anger management and domestic violence counseling.

In December 2007, mother's visits with A.S. and D.M. had to be separated because mother was showing such overt favoritism toward D.M. that it was having a detrimental effect on A.S. and on the relationship between the siblings. Conjoint therapy sessions intended to improve mother's bond with A.S. were scheduled to coincide with some of her visits with A.S., but mother missed 10 out of 18 scheduled visits with A.S., including the three visits scheduled to coincide with conjoint therapy.<sup>5</sup>

By the May 2008 review hearing, mother was pregnant again. She was unemployed and her living situation had become unstable – she lived for awhile with the grandparents, until an argument caused her to leave; in April, grandmother began paying mother's rent, despite step-grandfather's objections. In response to the social worker's suggestion that mother try to obtain a job skill, mother said, "What for I'll have money again when I get my kid back." Mother told the social worker that she had completed parenting classes, but she did not provide a certificate of completion; she said she was attending a drug rehabilitation program, but the director of the program told the social worker that mother was not attending. Mother had begun receiving individual counseling, but had missed sessions. Finally, mother had several negative drug tests, but

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<sup>5</sup> In response to a social worker's question to mother why she was not willing to be responsible for A.S., mother said: "I don't know. It's like I don't love him [A.S.]. I mean I love him, he's my son. But I don't love him like I love [D.M.]. I don't feel close to him." and "He irritates me. He cries for everything and he doesn't listen."

missed several other tests. A contested section 366.22 permanency review hearing was set for July 2008.

By the time of the July 2008 hearing, mother was still not in compliance; she was missing individual and conjoint counseling sessions, sometimes testing negative but also missing multiple tests, not attending a drug rehabilitation program, and refusing to have her new boyfriend “livescan.” Mother was unemployed and dependent on maternal grandmother for support. Because mother was missing so many of her separate visits with A.S., her visits with A.S. and D.M. were combined once again; but at the combined visits, mother continued to show favoritism to D.M. and her new baby. During visits, mother hugged and kissed D.M., but not A.S. The social worker for the foster care agency recommended terminating mother’s visits altogether because “the strong favoritism by this mother toward [D.M.] is a form of emotional abuse and is detrimental for the children’s emotional well[-]being and a healthy sibling relationship. As long as [A.S.] and [D.M.] stay in the same home, both should not have visits with their mother.” The department recommended termination of reunification services for mother and adoption as the permanent plan. At the hearing, mother’s counsel explained that mother was withdrawing her contest because she planned to finish the program she was in and then file a section 388 petition. Mother’s reunification services were terminated and it was ordered that she have no more visits with A.S. (although she continued to have monitored visits with D.M.). A contested section 366.26 (.26) hearing was set for November 2008. The court also set a progress hearing on August 4, 2008, for A.S. and ordered the department to submit a letter from A.S.’s therapist addressing visits with mother.<sup>6</sup> Meanwhile, in August 2008, the children were placed together in a prospective adoptive home.

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<sup>6</sup> In a report for the hearing, the social worker stated that, because A.S.’s case had been closed, the therapist could not provide a written statement. The therapist told the social worker that, although she had never observed mother and A.S. together because mother never attended any of the scheduled conjoint therapy sessions, mother’s treatment of A.S. described by the social worker “is not conducive to his mental well[-]being and development.” The social worker recommended terminating mother’s visits with D.M.

By the time of the November .26 hearing, D.M. seemed happy in the prospective adoptive home. The hearing was continued to January 2009. At a progress hearing the week before the .26 hearing, the juvenile court granted mother's counsel's request for a referral to an agency that does post-adoption agreements.

The report prepared for a January status hearing stated that D.M. and A.S. were flourishing in the prospective adoptive home. D.M. had "transformed from a clingy, insecure child with separation anxiety to a friendly, out-going, independent toddler with a lot of personality. . . . Other than on Wednesdays, the day after the regularly scheduled visitations with biological mother, [D.M.] is eager to attend day care and enjoys playing with her peers and learning new things." D.M. referred to the prospective adoptive mother as "mommy" and showed her spontaneous affection.

According to a Last Minute Information For The Court prepared for the January 12, 2009 .26 hearing, from September through November mother attended four of the nine scheduled visits with D.M. From November through January 6, 2009, mother attended two out of seven scheduled visits with D.M. At a visit on December 2, 2008, D.M. hugged mother at mother's request; after about an hour of playing with mother, D.M. walked to the door and said, "o.k., go bye bye"; after D.M. repeated this every five minutes for 15 minutes, mother sat on the couch and talked on her cell phone instead of engaging with D.M.; mother told the social worker that she hoped D.M. would fall asleep so that mother could leave. At a visit on December 9, 2008, mother did not engage D.M. except for a few minutes of coloring; when D.M. started to cry after slipping and hitting her head, mother remained seated on the couch while the social worker comforted D.M. According to the report, mother "appears to have difficulty developing and sustaining a

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because the plan was to place the children together, and the fact that D.M. was continuing to visit mother was threatening the sibling relationship. At the August hearing, the court ordered A.S. to begin therapy immediately and the department to address visitation in its report for a September progress hearing. For the September hearing, the social worker reported that A.S. had not demonstrated any negative behavior since visits with mother had been terminated. On September 9, 2008, the juvenile court ordered that mother be allowed to continue visiting D.M. and to have therapeutic visits with A.S.

bond with [D.M.] as evidenced by mother's unresponsiveness to [D.M.] when she cried after falling down . . . .”

At the .26 hearing on January 12, 2009, mother's counsel told the court: “[Mother] indicated to me that she does not want to take [the] stand today and without her testimony I have no other evidence to offer. And my client has also indicated to me she would go with an appeal. So at this time, since I have no evidence to offer, I would just object to the termination of her parental rights and withdraw the contest.” The juvenile court found by clear and convincing evidence that D.M. was adoptable and that it would be detrimental to return her to mother; accordingly, it terminated mother's parental rights to D.M.

Mother filed a timely appeal.

## **DISCUSSION**

Mother contends it was error to terminate her parental rights because the court erred in its implicit finding that an exception to section 366.26 did not apply. We find no error.

At the .26 hearing, the juvenile court is required to select and implement one of four possible permanent plans for the children. The permanent plan preferred by the Legislature is adoption. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411.) If a child is likely to be adopted, the statute directs the court to terminate parental rights and order the child placed for adoption. (§ 366.26, subd. (c)(1).) However, section 366.26, subdivision (c)(1)(B)(i) creates an exception to the adoption preference where termination of parental rights would be detrimental to the child because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (*Ibid.*)

It is the parent's burden to show the statutory exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826 (*Derek* ).) To do so, a parent has to do more than demonstrate frequent and loving contact with the child, an emotional bond with him, or that the child finds their visits pleasant. (*Id.* at p. 827.) “Instead, the parent must show

that he or she occupies a ‘parental role’ in the child’s life. [Citations omitted.]” (*Ibid.*; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The exception “is not a mechanism for the parent to escape the consequences of having failed to reunify.” (*Id.* at p. 1348.) In order for the exception to apply, the parent must have maintained such a strong and beneficial parent-child relationship that terminating parental rights would be to the minor’s detriment. (*Id.* at pp. 1348-1349.) The parent must show that continuing the parent-child relationship would promote the child’s well-being sufficiently to outweigh the well-being to be gained from a permanent home with a new adoptive parent. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.)

We review the juvenile court’s finding that an exception to termination of parental rights does not apply for substantial evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 227-228.) The juvenile court does not have a sua sponte duty to determine application of any of the exceptions to the termination of parental rights and the failure to raise in the juvenile court the question of the applicability of an exception constitutes a waiver of the issue on appeal. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 292.) Here, because mother did not raise the applicability of the exception at the .26 hearing, she has waived the issue for appeal. (*In re Daisy D.*, *supra*, 144 Cal.App.4th at p. 292.)

Even if no waiver occurred, mother has failed to show that continuing the parent-child relationship would promote D.M.’s well-being sufficiently to outweigh the well-being D.M. would gain from a permanent home with an adoptive parent. Mother offered no evidence of such at the .26 hearing. On appeal, mother argues that the evidence that was introduced by the department (e.g., the reports) showed that mother maintained regular visits with D.M. during which she showed D.M. love and affection. But the reports show no such thing. On the contrary, the reports indicate that mother did not “parent” at the visits, leaving this to the social worker. Mother’s assertion that the fact she was parenting her newborn “without any problems or concerns” demonstrated that she “would not pose a risk to D.M., thereby establishing that D.M. would benefit from continuing her relationship with Mother[,]” is not persuasive.



## **DISPOSITION**

The order is affirmed.

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RUBIN, ACTING P. J.

We concur:

FLIER, J.

BENDIX, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.